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# PENAL VS. CONFISCATION-ONLY APPROACHES IN MONEY LAUNDERING CONTROL

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## ABSTRACT

This article examines two primary approaches to money laundering control: traditional penal and confiscation-focused approaches. These approaches are evaluated based on their potential in confiscating criminal proceeds and deterring effects. Data from recent Lithuanian money laundering proceedings enriches this analysis. The data encompasses discontinued pre-trial investigations, final court judgments in criminal proceedings, and court decisions in civil proceedings against suspicious assets arising from discontinued pre-trial investigations. The research reveals limited success and minimal added value associated with the sole prosecution of money laundering, particularly in self-laundering cases. However, the study highlights the remarkable efficacy of a combined approach for combating illicit financial flows. This approach leverages the investigative powers available during pre-trial money laundering investigations alongside the rules and standards of civil proceedings. This synergy facilitates the successful declaration of suspicious assets as ownerless and subject to forfeiture by the state.

**KEYWORDS**

Money laundering, civil confiscation, crime proceeds, illicit flows, proportionality

## INTRODUCTION

This article presents results from the research project LEKOSTRA,[1] which addresses prosecution of money laundering and other confiscation strategies. The project's main idea is evaluating the system of existing modern legal concepts and approaches aimed at confiscating crime proceeds.

This project examines how various confiscation measures operate and interact within the broader framework. It also endeavours to compare these measures, evaluating which achieves the set objectives most effectively while minimizing unintended "collateral damage." Alongside the theoretical analysis of the fundamental operational principles of legal instruments, considerable attention is paid to data from the justice system to assess how different confiscation measures function in practice. This includes examining whether their application aligns with the declared targets and identifying any unforeseen collateral damages, including infringements of the proportionality principle.

R.T. Naylor noted back in 1999 that "these new legal initiatives are powerful tools, sufficiently so that it is reasonable to ask that they not be deployed unless and until their need has been unambiguously established, their objectives clearly delineated, and the public well informed both of their actual (as distinct from purported) purpose and of any 'collateral damage' their use might entail".[2] However, the capacity for precise execution of theoretical ex-ante analysis and forecasting is limited. When these measures are implemented in practice, a wealth of additional data is generated, enriching and refining theoretical predictions. Our research project focuses on both of these aspects.

The practical component of this project and present article draws heavily on the practices of the Lithuanian law enforcement system. Lithuania holds a unique position in continental Europe, having enacted one of the broadest arrays of confiscation measures, encompassing civil confiscation, declaration of assets ownerless resulting in their forfeiture, criminal liability for illicit enrichment, extended powers of confiscation, and criminal liability for money laundering. The latter measure, criminal liability for money laundering as a strategy to control criminally acquired assets and their flows, forms the subject of analysis in this Article. It is examined from multiple angles: whether the objectives set out in the introduction of money laundering prosecution are achieved in practice, whether certain side effects arise (particularly in the context of the principles

1 The research project LEKOSTRA is funded by the Lithuanian Academic Council, the funding contract No. S-MIP-23-40.

2 R. Thomas Naylor, "Wash-out: A critique of follow-the-money methods in crime control policy," *Crime, Law and Social Change* 32 (1999): 2 // https://doi.org/10.1023/A:1008386203362

of proportionality and prohibition of self-incrimination) that could cast doubt on the suitability of this measure for achieving the set goals, and whether other measures allow for more effective and appropriate pursuit of the same objectives.

The article analyzes the outcomes of money laundering prosecution in Lithuania between 2016 and 2023. Using the LITEKO and INFOLEX databases, the authors collected all available court decisions from all instances in cases where charges were brought under Article 216 of the Criminal Code of the Republic of Lithuania (hereinafter referred to as the CC) and where first-instance court judgments were issued during the specified period. The study includes only those cases in which the court decisions had become final by the time the analysis was conducted (May 2024). A total of 32 cases were examined, in which 57 individuals were charged with money laundering.

In addition, 28 decisions to terminate pre-trial investigations of money laundering, issued between 2018 and 2022, were analyzed. These were selected from a list provided by the Prosecutor General's Office, excluding those terminated due to the statute of limitations and randomly selecting 21 from 2020–2022 and 7 from 2018–2019. The decisions to terminate pre-trial investigations into money laundering were used exclusively for qualitative research purposes. Also, some observations of the developments of the proceedings after the discontinuation of the pre-trial investigation for money laundering have been made. Several available civil proceedings that concerned the declaration of assets as ownerless following the discontinued pre-trial investigations have been analyzed where the courts had reached final decisions.

The analysis of practice has been enriched with semi-structured interviews with two officers of the financial investigation service (FNTT), two officers of the State tax inspectorate (VMI), a judge of the Lithuanian Court of Appeals and a judge of the Lithuanian Supreme Court.

## PUNISHMENT (DETERRENCE) VS. SOLELY ASSET RECOVERY-ORIENTATED APPROACHES

One of the major aims for the concept of prosecution for money laundering, like for the other alternative crime proceeds control concepts, is the confiscation of crime proceeds where traditional legal means do not allow it.[3] The traditional legal way for confiscation of crime proceeds is a conviction for a predicate (source) crime and establishing the link between the offence and the property. However, the vast majority of offences remain undetected; the offenders often may not be identified or convicted. Establishing a direct link between predicate offence and the property in question (on the standard of beyond reasonable doubt) may be a very complicated task, even in cases where a highly intense criminal context surrounds the property. Thus, classic confiscation measures do not allow confiscation of highly suspicious assets accumulated by persons who are engaged in systemic offending where the link between their offences, successfully investigated by law enforcement, and all accumulated property may not be established. In the context of transnational organized crime, the obstacles to crime proceeding confiscation are particularly hard to overcome with orthodox legal means.[4] Inefficiency

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3 Guy Stessens, *Money laundering: a new international law enforcement model* (Cambridge University Press, 2004), 85.

4 *The European Commission, Communication from the Commission to the European Parliament and the Council – Proceeds of Organized Crime: Ensuring That "Crime Does Not Pay"* (2008) // https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52008DC0766; United Nations Convention Against Transnational Organized Crime And The Protocols Thereto (2000).

of confiscation regimes would mean failure in removing the main motive for profitable offences, failure to re-establish fundamental principle of legal order (or rule of law, principle *ex inuria ius non oritur*) and also failure to remove economic power from the offenders. The central challenge for legislators has been, and continues to be, the establishment of a legal framework that facilitates the efficient confiscation of criminal proceeds. This framework should ideally enable the confiscation of assets demonstrably derived from criminal activity without requiring the identification and prosecution of a specific predicate offence or the culprit responsible for it. However, this approach must be balanced against the need to minimize the risk of wrongful confiscation, disproportionate sanctions, and violations of fair procedure.

Modern asset confiscation strategies develop in two different directions. Some aim solely at the confiscation of assets of likely criminal origin. Others also seek to punish the individual who controls those assets. Civil asset confiscation, extended powers of confiscation, autonomous confiscation (*selbständige Einziehung* in German law)[5], and the seizure of ownerless property (a common civil law instrument creatively adapted in Lithuania for the confiscation of assets of criminal origin) are all directed solely at the confiscation of assets. Similarly, tax penalties for unexplained income, which only seize a portion of the suspected assets (up to 40% in Lithuania under Article 139 of the Tax Administration Law), fall into this category.

Initiating the application process for some of these measures requires a specific criminal procedural catalyst (trigger), such as a person's conviction for a crime, mere suspicion, or even the termination of a pre-trial investigation. However, this trigger does not necessarily fully reveal the criminal context of the asset's origin and serves more as a formal safeguard from over-reaching employment of confiscation proceedings. It may also serve as one of the indirect details that help to establish the criminal context of the property. Often the perpetrator does not derive any financial benefit from the resolved crime (the catalyst) but rather a loss (once the offence is uncovered and interrupted, usually, an offender may not profit from it). However, the fact of prosecution for a gain-oriented crime indicates a certain criminal context that is significant in deciding on the origin (and confiscation) of suspicious and unexplained assets accumulated by the suspect or convict (or their relatives). The fundamental idea of these legal measures is that the individual is neither punished for controlling assets of criminal origin nor is such punishment a condition for confiscation. The control of profit-oriented offences is limited and focused on confiscating crime proceeds.

Another crime proceeds confiscation strategies' development direction, which can be termed a "weaponized approach," involves constructing an offence in such a way that certain actions related to crime proceeds (even mere possession of such property or certain actions taken with it to hinder its detection or mask its origin) in themselves attract criminal liability. Criminal liability for these constructed offences also opens the door to the confiscation of relevant assets. This concept is underpinned by the offences of illicit enrichment and money laundering.

This concept incorporates a punitive element (absent in the previous concepts), which can be rather severe, including lengthy prison sentences. The prevailing view is that the risk of harsh punishment has a strong deterrent effect. However, it is necessary

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5 Matthias Korte, "Vermögensabschöpfung reloaded," *Wistra: Zeitschrift für Wirtschafts- und Steuerstrafrecht* 1 (2018): 1–12; Nils Elias, Wilfert, *Die Beweissituation im Recht der selbstständigen Einziehung in Deutschland und England*, Schriften zum Internationalen und Europäischen Strafrecht, Band 61, 1. Auflage (Nomos, 2022) // DOI: 10.5771/9783748913092

to evaluate this effect in light of the probability of conviction, which may not be very high due to the complexity of the criminal standards for conviction and the sophistication of money laundering schemes. Thus, the deterrent effect of criminal liability for any form of illicit enrichment and money laundering should not be overestimated.[6] Arguably, the realistic chances for the loss of accumulated crime proceeds alone might be a deterrent for offenders, especially when the value of the proceeds is significant. The European Commission has repeatedly emphasized that confiscation has a deterrent effect by strengthening the notion that "crime does not pay."[7] The deterrent effect of confiscation without punishment should not be underestimated, especially in light of the considerable effectiveness of confiscation mechanisms.

The penal "weaponized" approach offers certain advantages. Processes involving offences-constructs are autonomous and do not require an additional criminal procedural "catalyst" (trigger) to initiate them, as is the case for most legal measures directed solely at confiscation. Therefore, if a suspect controlled or possessed suspicious assets and had no criminal record or links to any criminal proceedings, this would not be an obstacle to applying this confiscation (and punishment) strategy against them.

Moreover, the international recognition of money laundering as an offence-construct, coupled with the commitment to cooperation among signatory countries to the relevant conventions, effectively eliminates legal obstacles like non-recognition of asset confiscation orders or refusals to collaborate in asset investigations.[8] For instance, this stands in stark contrast to civil asset confiscation processes, which are often plagued by international legal hurdles.[9]

The legal definition of managing of crime proceeds or unexplained assets as an offence (especially if serious offence) grants law enforcement broad investigative powers within the national legal system. In criminal proceedings against serious offences, obtaining warrants for intelligence gathering and procedural coercion measures is a straightforward process.

The threat of being prosecuted adds some deterrent effect. These strategies even make it possible to punish severely a person whose primary offence has not been detected and proven. In this case, the goal of justice is effectively achieved through the 'back door' by punishing not for committed (undetected) crimes, but for concealing or masking the proceeds of that crime. However, it is arguable whether such 'back door' tactics are compatible with the principles of the rule of law.

The high standard of proof of asset criminal origin as the element of an offence provides a higher level of protection against erroneous asset confiscation decisions. On the other hand, all these advantages come at a price in terms of efficiency. An individual can only be punished within the framework of criminal proceedings after proving all the elements of the crime (including the criminal origin of the suspicious assets) under the

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6 S. Bikelis explores the paradox in Ukrainian law where more serious offenders may enjoy an advantage if they were targeted with severe but not very realistic, relevantly easily avoidable criminal liability instead of potentially highly efficient civil confiscation, which was reserved for lesser-scale illicit enrichment cases. Skirmantas Bikelis, "Chasing Criminal Wealth: Broken Expectations for the Criminalization of Illicit Enrichment in Lithuania," *Journal of Money Laundering Control* Vol. 25, No. 1 (2022) // DOI: 10.1108/JMLC-12-2020-0135

7 Commission (2008), *supra* note 4; *The European Commission, Proposal for a Directive Of The European Parliament And Of The Council on Asset Recovery and Confiscation* (2022) // https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0245&qid=1653986198511

8 Frank Saliger, "Grundfragen Der Vermögensabschöpfung," *Zeitschrift Für Die Gesamte Strafrechtswissenschaft* 129.4 (2018): 1009 // DOI: 10.1515/zstw-2017-0047

9 Skirmantas Bikelis, "Label V. Content: The Problem of Non-Recognition of Civil Confiscation Orders in Europe," *Baltic Journal of Law & Politics* 15(1) (2022): 54–70 // DOI: 10.2478/bjlp-2022-0003

highest standard of criminal proof and the presumption of innocence. Additionally, to confiscate assets of criminal origin on the basis of a criminal conviction, the perpetrator must be identified, their guilt proven, and there must be no other obstacles to holding them criminally liable. Money laundering under a false identity (e.g., using stolen identity data or socially vulnerable "mules" who agree for a small fee to be the fictitious directors of fictitious companies, knowing nothing about the origin and destination of illicit flows) is a very common liability-avoiding tactic. Therefore, there is a significant risk that pursuing the maximum outcome (not only confiscation but also the conviction of the perpetrator) and relying solely on criminal prosecution may not achieve either goal due to the difficulty of proving the individual's guilt.

Measures that are directed solely at the confiscation of assets and do not aspire to punish the perpetrator have a significant advantage. The absence of the pursuit of conviction allows for the application of a lower standard of proof of the (criminal) origin of the assets or even presumptions of the illegal origin of the assets.[10] In addition, some of these measures allow for the confiscation of assets even without identifying the actual owner of the assets of criminal origin. In other words, with more focus on confiscation and less on deterrence through penal means, the non-penal approach has an advantage over some key efficiency weaknesses of the penal one.

This is the reason why recent years have seen intensive creative work in constructing and implementing non-penal confiscation strategies (or at least strategies containing some elements of the non-penal approach) both in Lithuania and in other countries, such as: civil confiscation laws in Lithuania (2020), Bulgaria (2012, 2018), Slovenia (2011), Ukraine (2019), Slovakia (2010), Italy (renewed in 2011), autonomous confiscation in Germany since 2017, unexplained wealth orders in England (since 2017), extended powers of confiscation in all the EU member states (the EU framework decision 2005/212/JHA, former directive 2014/42/EU, new directive 2024/1260 on confiscation of crime proceeds).[11]

## SIDE-EFFECTS OF THE PUNITIVE ELEMENT OF THE ML OFFENCE

The money laundering (ML) offence concept was initially targeted at international organized crime and the illicit proceeds generated by and facilitating such crime.[12] Consequently, there was no hesitation in "weaponizing" this legal tool with severe sanctions. However, as organized crime extends beyond drug trafficking and other clearly defined criminal activities, the scope of the ML offence (and the application of severe sanctions) has gradually expanded.[13] As the scope of application has broadened, the ML offence and corresponding sanctions have begun to encompass offences and offenders outside

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10 See well-established jurisprudence of the European Court of Human Rights (ECoHR) concerning extended powers of confiscation (*Phillips v. the United Kingdom (2001), Telbis and Viziteu v. Romania (2018), Balsamo v. San Marino (2019)*) and civil confiscation (*Arcuri v. Italy (2001), Butler v. the United Kingdom (2002), Gogitidze and others v. Georgia (2015), Dimitrovi v. Bulgaria (2016)*).

11 See also Johan Boucht, "Non-conviction Based Confiscation: Moving the Confiscation of Criminal Proceeds from the Criminal to the 'Civil' Sphere: Benefits, Issues and Two Procedural Aspects": 221–248; in: C. Harding & V. Franssen (eds.), *Criminal and quasi-criminal enforcement mechanisms in Europe: origins, concepts, future* (First edition) (Hart Publishing, 2021) // https://doi.org/10.5040/9781509932894 and Skirmantas Bikelis, "Modeling the Patterns of Civil Confiscation: Balancing Effectiveness, Proportionality and the Right to Be Presumed Innocent," Baltic Journal of Law & Politics 13:2 (2020): 24–48 // DOI: https://doi.org/10.2478/bjlp-2020-0010

12 Adolf Schönke, Horst Schröder, Albin Eser (ed.) et al., *Strafgesetzbuch: Kommentar* (30, neu bearbeitete Auflage) (C. H. Beck, , 2565.

13 Stessens, *supra* note 3, 12; Yulia Chistyakova, David S. Wall, and Stefano Bonino, "The Back-Door Governance of Crime: Confiscating Criminal Assets in the UK," *European Journal on Criminal Policy and Research* Vol. 27 (2019): 495 // https://doi.org/10.1007/s10610-019-09423-5

the realm of international organized crime. In defining predicate offences for money laundering, there has been a shift from a "list-of-the-most-serious-crime" approach to an "all-crime approach."[14] This has brought into the scope of the ML offence, for example, petty fraud or embezzlement and the concealment of proceeds from minor corruption or small-scale drug trafficking.

Applying liability for the laundering of proceeds from an individual minor offence raises the question of proportionality of punishment, especially in jurisdictions (e.g. Lithuania) that have adopted a single undifferentiated definition of the ML offence and a general, very strict sanction (unlike jurisdictions that reserve very strict sanctions only for ML with aggravated elements like systemic, professional, or organized crime-related ML, see German definition in Art. 261 Penal Code). In such cases, money laundering itself attracts more severe legal consequences than the predicate offence, which does not appear consistent and proportionate.

For instance, in the Supreme Court "timber case," an individual who forged an invoice to legalize ten cubic meters of stolen timber worth around 1200 euros (in Lithuania, such theft would be a non-serious offence, punishable with alternatives to imprisonment, unless committed by an organized group), was sentenced to 2 years imprisonment for money laundering as a serious offence.[15] In another case, an individual fraudulently obtained 907 euros and deposited them into another person's account. The individual then concealed the money by making transfers to various individuals in the other person's name. For the relevantly small-scale fraud (a non-serious offence), the individual was sentenced to 10 months imprisonment. However, for laundering the money, the individual received a sentence of 24 months imprisonment.[16]

In cases where an individual accumulates assets from a series of minor offences and then attempts to launder them, concerns regarding the proportionality of punishment for money laundering would be less justified. Failing to adopt the all-crime approach would likely, and unjustifiably, exclude such relevantly minor serial (professional) offences, which can generate significant accumulated criminal proceeds from the scope of liability for money laundering.

The scope of money laundering (ML) offences has expanded not only in terms of predicate offences but also in terms of individuals. This refers to the application of liability for self-money-laundering, where an individual conceals and attempts to legalize money obtained through fraud, embezzlement, drug trafficking, etc., committed by themselves, and is punished not only for the primary offence but also for the management (concealment) of the assets obtained from the primary offence.

The rationale behind expanding liability for money laundering to include self-laundering is that it aims to address the very specific loophole where, in the case of an international crime, the perpetrator who commits the predicate offence in another jurisdiction (and is not punished there) remains unpunished unless they are convicted and punished for self-laundering. This is, so to speak, a 'back-door' justice administration case. The criminalization of self-laundering also addresses the apparent inconsistency that an individual providing money laundering services is punished, while the perpetrator of the predicate offence who performs analogous actions would remain unpunished.[17]

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[14] Stessens, *supra* note 3, 11–12.
[15] *Lithuanian Supreme Court*, case No. 2K-7-96/2012.
[16] Šiauliai district court, case No. 1-26-282/2016.
[17] Stessens, *supra* note 3, 121.

It is doubtful whether it would be inconsistent to punish only third parties for money laundering. The constitutional principle prohibits forcing for self-incrimination (e.g. Article 31, Part 3 of the Constitution of Lithuania). Criminalizing self-laundering without certain limitations may conflict with constitutional protections against self-incrimination, as it could compel individuals to disclose the origin of assets derived from their own offences and thus disclose their offences. G. Stessens cites the opinions of C. K. Graber and G. Arzt that no offender could be expected to surrender themselves to the police out of their free will, neither could it be expected that they would not try to render the proceeds of their own crimes unrecognizable.[18] Justice O. Fedosiuk of the Lithuanian Supreme Court raised a thought-provoking question during an interview. He inquired whether self-laundering charges would apply in situations where a suspect or their family member refused to acknowledge, during a search, that the discovered property derived from their own criminal activity?[19] If so, it would arguably constitute compelled self-incrimination. The constitutional clauses are reflected in the exemptions of criminal liability for concealing one's own or a close relative's crime provided in Article 237 of the Lithuanian CC. However, due to the influence of supra-national regulations, they have no reflections in Art. 216 of CC, that provides liability for money laundering and Art. 189 of CC that provides liability for possessing or handling of stolen goods.[20] In cases where an individual engages in acts such as falsifying documents or accounting records to conceal assets derived from their own criminal offences and then delivers those assets into the market, they can be held liable under relevant statutes for those specific actions.[21] But, the definition of an ML offence as self-laundering without any limitations, seems to be at odds with the constitutional principles.

The political rationale for punishing self-laundering is diminished by the fact that in the absolute majority of self-laundering cases, the individual is altogether punished for the underlying predicate offence in the same or preceding criminal proceedings. The situation that justifies the criminalization of self-laundering, providing that an offender was not punished for predicate offence due to the jurisdiction or other issues, did not happen in analyzed Lithuanian practice.

The use of self-laundering charges as a 'back-door' approach to achieving justice when conviction for the predicate offence is difficult or impossible to achieve, raises concerns about undermining the rule of law. However, criminalization of self-laundering is internationally promoted and mandatory under supra-national laws.[22] As Boucht has noted,

> asset recovery law is particularly tinged by the tension between efficacy arguments (the use of broad, draconian regimes) and Rechtsstaat-based arguments (protection of individual rights). There is a tendency today to give preference to the former.[23]

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[18] *Ibid*.
[19] Semi-structured interview with the Supreme Court Justice Olegas Fedosiuk on 25 January 2024.
[20] Art. 3 section 5 of the Directive (EU) 2018/1673 obliges the member states to take the necessary measures to ensure that money laundering is punishable as a criminal offence when committed by persons who committed or were involved in the criminal activity from which the property was derived. *Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on Combating Money Laundering by Criminal Law*, CONSIL, EP, 284 OJ L (2018) // http://data.europa.eu/eli/dir/2018/1673/oj/eng
[21] For instance, Article 261, Section 7 of the German Penal Code provides that a person held liable for a predicate offence is also liable for money laundering only if they deliver the proceeds of crime to the market while concealing the origin of the assets.
[22] Directive (EU) 2018/1673, *supra* note 20.
[23] Boucht, *supra* note 9, 223.

The criminalization of self-laundering presents a challenge in achieving proportional punishment. Empirical research suggests that Lithuanian courts address this proportionality concern by resorting to a form of sentence concurrence. In such cases when the defendant is convicted of both the predicate offence and self-laundering, the imposed penalty for self-laundering is minimal or even entirely subsumed within the sentence for the predicate offence. This way the deterrent effect of self-laundering sanctions in fact fades or even completely disappears. Furthermore, asset confiscation, often cited as a key justification for money laundering criminalization, can be achieved through classic confiscation of crime proceeds in connection with a conviction for predicate offence. Thus, impact of conviction of self-laundering concerning confiscation of the assets is in fact null.

The added value of self-laundering criminalization in situations where the predicate offence has been resolved appears dubious. This holds true from the perspectives of both deterrence through punishment and enabling confiscation of crime proceeds. In addition, prosecution for self-laundering creates tensions in the context of the constitutional principles and poses risk of overly severe punishment. However, self-laundering prosecutions make up a significant portion of all money laundering prosecutions, at least in Lithuania, where in recent years approximately half of all money laundering convictions involve defendants convicted of the predicate offence.[24]

## MONEY LAUNDERING PROSECUTION RESULTS FROM LITHUANIA

Lithuanian penal law classifies money laundering as a serious offence, be it with or without aggravating circumstances like professional or large-scale money laundering, assets' links to the organized crime, and provides the sanction of a fine up to 300 000 Eur or imprisonment up to 7 years. How does this sanction translate into (deterrent?) response to the money laundering in practice?

In Lithuania, convictions for high-profile international and organized crime-related money laundering are rare for a number of reasons. On the one hand, this rarity is due to the efficiency issues of the penal approach that have been already mentioned. A significant portion of pre-trial investigations are terminated due to insufficient evidence to convict, particularly concerning the criminal origin of the assets or the identification of the true perpetrator responsible for the money laundering activity. On the other hand, some practical specifics come into play. Lithuania is often used as a transfer country for illicit flows. Consequently, as high-ranking officers of the Lithuanian Financial Crime Investigation Service (FNTT) noted in the interview, trials for suspicious money seized in Lithuanian payment institutions occasionally occur in the foreign jurisdiction where the offenders originate, following the conclusion of international joint investigations.[25] Another factor is that in Lithuania, which is a small country with a population of slightly less than 3 million, the number of local wealthy organized criminal groups is rather low.

It is safe to say that no professional enablers who manage large-scale illicit flows running through complex networks that often include chains of offshore companies (the enablers the money laundering offence was created to target in the first place) have

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24 MONEYVAL reports on Lithuania indicate that in earlier years (before 2018) convictions for self-laundering evidently dominated and third party ML were rare. See Moneyval reports on Lithuania 2018 and in particular earlier reports.

25 Semi-structured interview on 24 January 2024 with deputy director of the FIU of Lithuania (FNTT) Mindaugas Stravinskas and Head of the Property Investigation Division of the Special Tasks Department at FNTT Lilija Lavinskienė.

been tried for money laundering in the analyzed timeframe. While analyzing decisions to discontinue pre-trial investigations for money laundering, we observed that investigations of this kind of money flow are being discontinued due to the aforementioned criminal investigation issues.

*1 table. Criminal trials for money laundering (Art. 216 PC) in Lithuania (2016–2023)*[26]

| | *Self-laundering* | | *Third-party laundering* | | |
|---|---|---|---|---|---|
| | *Cases* | *Defendants* | *Cases* | *Defendants* | *Total* |
| *Convictions* | *11* | **16** | *12* | **20** | *36 (63%)* |
| *Acquittals* | *11* | **11** | *8* | **10** | *21 (37%)* |
| *Conviction rate* | | **59%** | | **67%** | *63%* |
| *Total* | *22* | *27 (47%)* | *20* | *30 (53%)* | *57 (100%)* |

The overall rate of acquittals (37%) shows rather low prosecution success in the courts. In more than half of the cases, the main reason for acquittals was different interpretations of the elements of the money laundering offence by the prosecution and the courts. In five cases (24%), the courts did not accept that the use of income from a private business that is fully operational but unregistered in a proper way, as well as re-financing operations of the same business, could be qualified as money laundering. The defendants were convicted for an offence of running a business illegally instead. In six acquittal cases (29%), the intermediaries either helped to cash out the proceeds of fraud via ATMs and delivered cash to someone related to offenders or provided their accounts to facilitate transfers of fraud proceeds (for someone else later to cash out the proceeds from their accounts). The courts argued that the aim of the intermediaries did not constitute either concealment of the origin of the money or concealment of the money itself but only delivery of the cash to the ones who earned it in a criminal way upon their request. That interpretation was prevailing (but not unanimous) in the judiciary during the timeframe covered by our analysis. However, from the beginning of 2022, the definition of money laundering in Art. 216 of Lithuanian PC was complemented with the missing element provided in the AML conventions' intent to help any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her actions. To the extent that cash delivery services can be construed as obfuscating the true ownership of funds from investigators, there is a potential argument that such intent is to be considered as a money laundering indication by the courts in the post-2021 practice.

Other reasons for acquittals also had nothing to do with typical money laundering investigation issues, which would be a failure to establish either a link between the predicate offence and the property or the identity of the offender behind the management of the property. In five cases (24%), the courts decided that the established source of money was not, in fact, of a criminal nature. In the remaining three proceedings, courts terminated proceedings due to the expired statutes of limitation, missing laundering intent for using stolen goods and the finding that a defendant did not participate in the alleged money laundering.

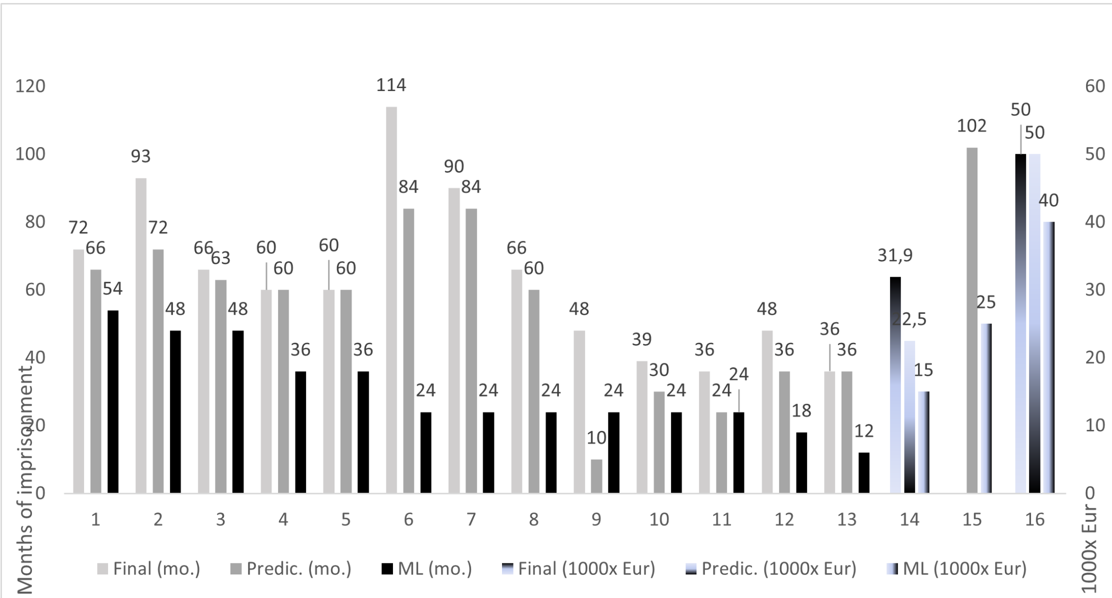
In the cases where defendants were convicted for self-laundering, in nearly a third of cases (5) the most serious predicate offence (for which defendants were also

[26] The year indicates the date of the decision in the first instance court. The results are taken from the final decisions. Only proceedings where the final decision has come into force are included.

convicted in the same proceedings) was a fraud (one case for basic fraud that was not serious offence, and four cases of serious fraud). In 4 cases (25 %) there was serious misappropriation, where directors stole money from their companies. There was one case of serious embezzlement, two cases of serious passive bribery, and in one case four defendants were convicted for trafficking in very large amounts of drugs, illicit cigarettes and also money laundering.[27] In many of these cases, defendants were convicted of multiple offences.

In third-party money laundering, the vast majority (15 out of 20) of defendants (in 8 of 12 cases) were convicted for falsification of documents or/and identification numbers of vehicles stolen in Western and Northern Europe (quad-bikes, heavy agriculture equipment, trucks) or/and registering them in the registers and trafficking the equipment. The other single instances of convictions for money laundering were laundering fraud money received from abroad (31 250 Eur), laundering some cash provided by a friend by including into the books of a company fake service contracts (53 100 Eur) and two teenagers were convicted for an attempt to cash out crypto ransom (30 000 Eur) as they were asked to do so by the group behind the kidnapping of some person. Another defendant was convicted for merely a promise to find access to someone's account for their prison fellows who were planning the phone scam.

In the self-laundering cases that were analyzed, the deterrence effect of money laundering sanctions was rather doubtful. Offenders chose to commit serious crimes that are threatened with even more severe sanctions (including drug offences with sanctions up to 15 years of imprisonment). Covering the origin of the proceeds was an inevitable part of their criminal activity.




*Picture 1. Punishments in self-laundering cases in Lithuania (2016–2023)*

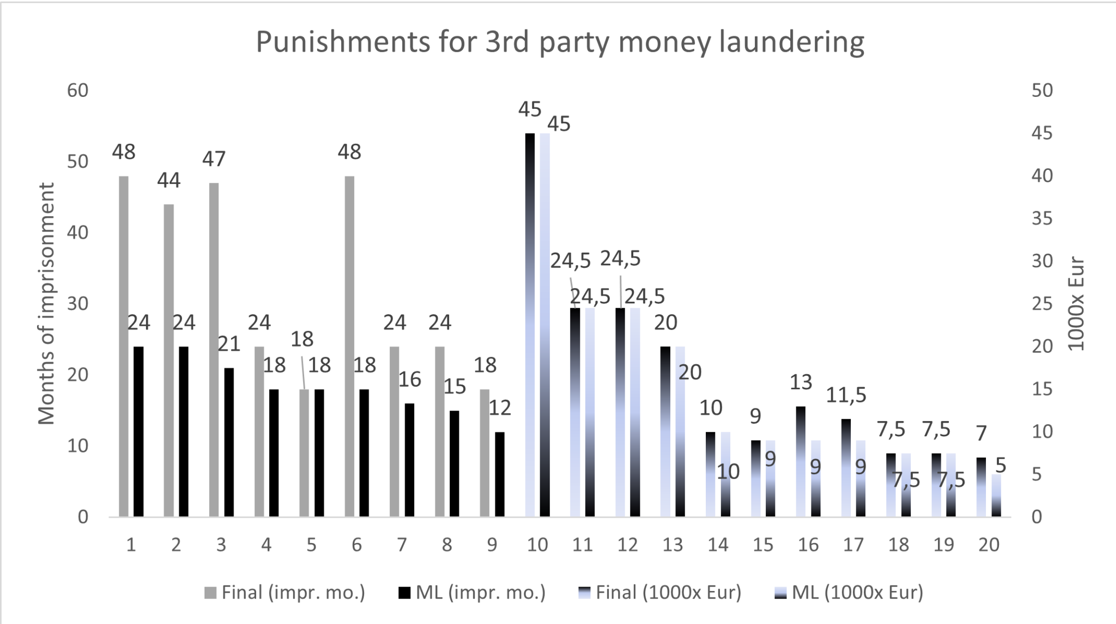
At first glance, the imposed sanctions for self-laundering were rather severe. 13 of 16 defendants received imprisonment in the range from 4,5 years to 1 year, and the rest sanctions were fines (15 000, 25 000 and 40 000 Eur, shown in gradient columns

[27] However, in the drug and cigarettes trafficking case charges with self-laundering concerned only a purchase of two cars – VW Golf for less than 2000 Eur and BMW X3 for 32 000 Eur (Court of Appeal case No. 1A-20-1076/2020).

on the right of picture 1). However, in the process of aggregation of sanctions imposed for all offences, in most cases, only a fraction of sanctions for money laundering were added to the final aggregated sanction. Picture 1 shows all 16 cases of self-laundering, where the first column shows the final cumulated punishment, the middle column – punishment for a single most serious predicate offence and the third column – punishment for a single money laundering offence (except for case 15, where the court did not combine the punishments, but added a fine imposed for money laundering to the imprisonment punishment for predicate offence in full). In many cases there were multiple predicate offences, money laundering acts and money laundering-related offences (document forging, illegal connection to the account of the other person, etc.). Sanctions of imprisonment are either in grey or in black, and fines are in gradient. In four cases, 0 ML sanctions were added on the top of the sanctions for predicate offences and in another case only 3 months of 4 years sanction were added (see columns 3, 4, 5, 13, 16 in the 1 picture). Also, in three instances only 6 months from sanctions from 2 to 4,5 years were added to the final sentence (columns 1, 7, 8). In most other cases, where final punishment differs significantly from the punishment for the single most serious predicate offence, punishment for multiple predicates accumulated. It would be difficult to argue if the punishment for money laundering had significant weight on the final sanction there. The general pattern of sentencing for self-laundering looks rather logical. Although the reasoning and details behind the application of sentence aggregation are not explicitly articulated in the judgments, it is evident that courts, in most instances, consider that the severe penalty imposed for the predicate offence(s) fully or largely encompasses the punishment for acts of self-laundering. In this manner, courts, through the application of sentence aggregation, address the fundamental issues concerning the justification of punishment for self-laundering.

One exception seems to be the case in which 26 predicate offences (non-serious fraud) were punished with lower penalties (10 months imprisonment for each of them) than multiple laundering of the proceeds of these offences (2 years imprisonment for each of the eight money laundering offences). Also, the defendant was convicted of other money laundering-related offences (i.e. 69 illegal uses of accounts of other people, penalized with eighteen months of imprisonment for each account and many other offences) (column 9 in picture 1). The final sentence was 4 years of imprisonment, which, with regard to a high number of both predicate offences and money laundering-related offences, does not seem disproportional. In contrast, if a defendant had committed and was later convicted of a single small-scale fraud (where maximum sanction is 3 years of imprisonment) and money laundering of the proceeds from a single small-scale fraud (where maximum sanction is 7 years of imprisonment) with the same punishments as in analyzed case (10 months for fraud and 2 years for self-laundering) which would lead to the aggregated final sentence of 2 years (or 2 years plus several months), then the issue of disproportionality of the use of anti-international-organized-crime tool against non-serious offence would be evidently exposed.

In contrast to self-laundering offences, sentences for third-party laundering were milder, with less than half (9 of 20) of defendants receiving imprisonment sentences (from 12 to 24 months) and the rest of them receiving fines from 5 000 to 45 000 Eur. Beyond other potential justifications, one explanation for the relatively lenient sanctions for third-party money laundering may lie in the context of self-laundering offences. In self-laundering cases, where money laundering charges are considered secondary and subsumed within the more severe penalties imposed for the predicate offences, courts might be more inclined to impose identical sort of punishments for both offences for the sake of a more convenient combination of the punishments into final one with regard to the knowledge that in the end the lesser penalty will be absorbed by the more severe punishment for the predicate offence. The fact that defendants were guilty of serious predicate offence also weighted for more severe punishment for self-money laundering. In third-party laundering cases, punishments for money laundering were the most severe of all punishments imposed on the defendant in all cases. So, in contrast to self-laundering cases, punishments for money laundering absorbed milder punishments, not vice versa.




*Picture 2. Punishments for 3rd party money laundering*

In third-party laundering, imprisonment was imposed on offenders who acted systematically and had some primary role. In most cases, they were convicted of multiple (from a few to 12 or even 23) counts of money laundering. Also, a defendant who was already serving his 3-year imprisonment sentence received 21 months imprisonment (reduced for admitting the offence to 14 months) for mere promise to assist in money laundering (column 3 in 2 picture). Other launderers, whose roles were occasional and secondary, were more likely to receive fines. The defendants in nearly all cases were convicted for multiple offences – money laundering and the offences that constitute acts of money laundering – and forgery of documents, false accounting, and falsification of vehicle ID numbers. The latter offences are defined as non-serious in the Penal Code, and the sanctions provided are significantly milder (up to 2–3 years of imprisonment, compared to sanction of up to 7 years of imprisonment for money laundering). The final (accumulated) punishments in the cases of secondary and occasional money launderers were fines and, in most cases, equal to the punishment imposed for money laundering or only slightly higher. The defendants who were convicted for multiple counts of money laundering and had some leadership in money laundering received imprisonment, and their final punishments were significantly higher than the ones imposed for a single offence.

## 'TURN OF TABLES' OUTSIDE THE CRIMINAL PROCEEDINGS AGAINST ILLICIT FLOWS

Apart from specific area of laundering of stolen vehicles, prosecution results against laundering of international large-scale illicit flows (which was the primary target of the concept of ML offence) look modest in Lithuania. In the timeframe of 8 years, only a single conviction for laundering international illicit flow, a single conviction for cash laundering service locally and a conviction for technical cashing out of crypto ramson have been achieved. None of them concerned money value exceeding 54 000 Eur.

In the sample of the analyzed discontinued pre-trial investigations, we could see a few typical international money laundering cases of relevantly large scale where either offenders successfully used identity thefts and uninformed proxy "company directors" to cover the true managers of illicit flows from criminal prosecution, or the proof of criminal origin of the money flow on the criminal standard was unavailable due to the extended layering transactions among proxy legal entities. In the early 2010s, Lithuanian law enforcement authorities employed a non-penal approach against the property in such discontinued cases. They introduced the practice of referring the assets, frozen in discontinued pre-trial investigation of ML, to the civil proceedings on declaration of the assets as abandoned and ownerless that subsequently would give legal ground for their confiscation to the ownership of the state (based on Art. 4.57 of Civil Code, Art. 534-537 of Civil Procedure Code, Art. 94 of Criminal Procedure Code). In 2013, the Supreme Court of Lithuania approved this approach in a pivotal case, giving a strong legal boost to the development of novel practice.[28]

The civil approach proved to be highly effective. The representatives of the State Tax Inspectorate (VMI), which represents the state in these civil proceedings, told us during the interview that they could not recall a single case where the VMI's claim was rejected by the court and confiscation attempt had been unsuccessful.[29] In our review of the judicial practice in these cases, we reached the same observations. We found that in six out of six analyzed final decisions of these proceedings, the courts declared the money ownerless (abandoned) and confiscated it for the benefit of the state (astonishing 100 per cent success rate). The value of the recovered money was substantial, reaching between EUR 3 million and EUR 11 million in half of the cases. These amounts were on very different levels from those seen in the criminal convictions for laundering illicit flows (reaching 30-53 thousand euros).

*Table 2. Value of the illicit assets declared abandoned property and recovered in the civil proceedings*

| *Case No and year* | *Total value in Eur* |
|---|---|
| *3K-3-129/2013* | *11,3 million* |
| *2A-1085/2014* | *4,17 million* |
| *2K-76-1073/2018* | *96 000* |
| *e2YT-14562-545/2019* | *2,9 million* |
| *e2YT-16140-1019/2023* | *260 000* |
| *2A-587-855/2024* | *351 000* |

[28] Supreme Court case No. 3K-3-129/2013.
[29] Semi-structured interview on 11 June 2024 with Jonas Čebelis, Senior Advisor of the Debt Administration Department at the State Tax Inspectorate (VMI) and Giedrė Vainauskienė, Head of the Bankruptcy and Restructuring Division of the Debt Administration Department of the VMI.

How and why did the civil proceedings on declaration of the assets ownerless (DAO) work? All the manoeuvres of the offender that make conviction for ML extremely difficult or even impossible work against their assets in the proceedings on DAO. In criminal proceedings, the prosecution needs to prove beyond reasonable doubt that a defendant is the actual manager of the illicit assets and that the assets originate from criminal conduct. In proceedings on DAO, in order to avoid confiscation, it is the ownership-claiming party who needs to convince the court on the balance of probabilities that they are legitimate managers of the legitimate assets. Thus, in DAO proceedings, the burden of proof shifts to the assets' ownership claiming party; otherwise, the assets may be declared ownerless.

All the offender's efforts to hide their links with the assets in criminal proceedings work in hand with the state claims in DAO proceedings. In addition, the threat of potential renewal of pre-trial investigation and potential conviction for money laundering works as the dissuasive/deterrent context for the potential parties for claiming their ownership.

A significant portion of the proceedings on DAO end up without counter-claims for the assets' ownership and without any debate at trial.[30] An example of the latter situation could be the following case. The investigators in a pre-trial investigation for ML established that a formerly Seychelles-based company X, now relocated to Russia, conducted a number of suspicious transfers, including one of more than 260,000 Eur to the account in the Lithuania-based payment institution that was subsequently frozen. The transfers were initiated by the director of the company electronically from different locations in Europe. During the pre-investigation, it was established that the provided address of the company did not exist, and the provided director of the company was 84 years old Russian lady who was a retired healthcare worker (who used to work in the local hospital) and who did not know anything about the company X and the transfers. The investigation was discontinued as neither the offender was identified nor the criminal origin of the assets was established. The frozen assets were transferred to the account of the VMI, and after a mandatory timeframe of one year expired, the VMI filed the claim to the civil court for the DAO proceedings. The claim was uncontested by any other party, and consequently, the court declared the assets ownerless and confiscated them to state ownership.[31]

In some cases, the ownership of frozen assets is contested by the proxy companies that have conducted the transfers. In such cases, the task of the civil court is to make a thorough assessment on the balance of probabilities if those companies indeed conducted legitimate business or were established solely for ML purposes. In parallel, the court assesses if the transactions with the suspicious assets were legitimate and based on genuine economic activities. If the assessment is negative, the court rejects the claims of the parties, and the frozen suspicious assets may be declared ownerless. In assessing the legitimacy of suspicious financial transfers, the courts request the company's financial records and other documentation substantiating their ongoing business activities. In addition, courts request additional documentation to substantiate the legitimacy of the business relationships purportedly underlying the suspected transactions. The high efficiency of successful confiscation indicates itself, and the case analysis of selected cases, shows that the courts do not take the evidence provided by

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[30] *Ibid*.
[31] Vilnius county court case No. e2YT-16140-1019/2023.

the parties lightly and formally. For example, in the DAO proceedings where the funds worth 4,17 million EUR were contested, the third parties – several companies behind the suspicious transfers (all of them registered in the US Virgin Islands) – provided the affirmation of their 'good state' from the Virgin Islands companies' Register assumingly proving their reliability. Nevertheless, the parties were unable to produce any further evidence demonstrating the legitimacy and substantiality of the investigated transfers or their business operations more generally. Moreover, the directors of the companies appeared to be socially vulnerable persons without any knowledge of contracts, transfers and business in general of 'their' companies. After the assessment of all the evidence presented in the case, the court rejected the companies' claims of the ownership of the assets, declared the assets ownerless and confiscated them to the budget of Lithuania.[32]

## CONCLUSIONS

The illicit-asset-confiscation-focused approach that combines the powers of pre-trial investigation with the civil proceedings rules on the trial stage provide ultimately efficient framework against illicit flows in the practice of Lithuanian justice system.

A punishment-focused approach to controlling illicit flows demonstrates poor results. It struggles to overcome common tactics employed to avoid liability, such as concealing the offender's identity through proxy agents, identity theft, or utilizing sophisticated asset-layering structures. These structures often involve companies solely created for money laundering purposes and devoid of legitimate business activities. Conversely, an illicit-asset-confiscation-focused framework utilizing civil proceedings on declaration of the assets ownerless can penetrate these liability-avoiding tactics. This is achieved by leveraging the presumption of ownerless status and shifting the burden of proof to the party claiming ownership.

The analysis did not identify any instances where the prosecution of self-laundering offences demonstrably added significant (if any) value to the control of criminal proceeds. The two key aspects are: lack of observable improvement in confiscation possibilities; and, an absence of any significant contribution to the deterrent effect of such prosecutions.

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